85-1647

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

APRIL TERM, 1986

HOWARD M. RUBINSTEIN
Petitioner

vs.

THE STATE OF TEXAS
Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEALS

OF THE STATE OF TEXAS,

10TH JUDICIAL DISTRICT AT WACO, TEXAS

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QUESTION PRESENTED

DID THE TRIAL COURT IN THIS DISBARMENT CASE FOLLOW THE QUASI-CRIMINAL GUIDELINES AS REQUIRED BY THIS COURT'S HOLDING IN IN RE RUFFALO THUS AFFORDING THE DEFENDANT HIS RIGHTS OF EFFECTIVE ASSISTANCE OF COUNSEL?

DID THE TRIAL COURT IN THIS CASE GIVE THE PETITIONER SUFFICIENT TIME TO RETAIN AN ATTORNEY AND PREPARE HIS CASE FOR TRIAL AS GUARANTEED BY THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND THE HOLDING IN NEUFIELD v. U.S.?[1]

DID THE TRIAL COURT ONCE LEARNING OF DEFENDANT'S INABILITY TO BE PRESENT AND ASSIST IN THIS CASE VIOLATE THE

[1] Neufield v. U.S., 118 F.2d 375 (D.C. Cir. 1973), cert. denied, 315 U. S. 789 (____).

DEFENDANT'S RIGHTS TO CONFRONT HIS ACCUSERS AS GUARANTEED BY THE SIXTH AMENDMENT?

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No. _____

IN THE SUPREME COUNT OF THE UNITED STATES

APRIL TERM, 1986

HOWARD M. RUBINSTEIN

PETITIONER

vs.

THE STATE OF TEXAS

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI

TO THE COURT OF APPEALS

OF THE STATE OF TEXAS,

10TH JUDICIAL DISTRICT

WACO, TEXAS

NOW COMES HOWARD M. RUBINSTEIN, Petitioner, and prays that a Writ of

Certiorari issue to review the Judgment of the Tenth Court of Appeals of the State of Texas entered on this cause on 17 of January 1985 and Motion For Re-Hearing by the Supreme Court of Texas denied on 8 January 1986.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Tenth Supreme Judicial District of Texas at Waco is unreported and appended below as appendix A, Court of Appeals for the Tenth Judicial District of Texas at Waco Docket No. 10-84-06 CV. The Order of the Texas Supreme Court denying the re-hearing is unreported and appended below as Appendix B Texas Supreme Court Docket No. C-4040.

STATEMENT OF JURISDICTION

The Court of Civil Appeals for the Tenth Judicial District entered Judgment on 17 January 1985.

The Texas Supreme Court denied the writ on 11 September 1985 and the Motion for Re-hearing was denied on 8 January 1986. The jurisdiction of this Court is invoked under 28 USC 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous

> crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the United States Constitution provides as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, as follows:

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdictions the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner Howard Rubinstein's personal secretary filed a complaint against Petitioner with a Grievance Committee for the State Bar of Texas in Harris County, Texas in 1980. (Said complaint formed the basis of Appellant's allegations in its formal complaint.)

The Grievance Committee for State Bar District No 4-B, State Bar of Texas, filed its formal complaint in the 164th Judicial District Court on January 2, 1981.

Petitioner filed its answer and Respondent then filed a motion for leave of court to amend its formal complaint, which was granted by the trial court. Respondent amended its formal complaint by adding an additional count being count fifteen which was never acted upon by any of the Grievance Committees involved in these proceedings.

The case on July 18, 1983, was set preferentially for trial for August 18, 1983. But was rescheduled to the 23rd because of a pending on-coming hurricane. Counsel for Petitioner filed a motion to

withdraw as counsel on July 18, 1983, which was overruled on July 18, 1983.

On August 23, 1983, without counsel and being forced to proceed Pro Se, Petitioner filed his motion to withdraw Pro Se. Said motion was overruled on August 23, 1983.

On August 23, 1983, Petitioner also filed, Pro Se, a motion for continuance so that he could appear by counsel of his own selection. Said motion was overruled on August 23, 1983. Also at hearing on August 23, 1983, Petitioner made an oral motion requesting a continuance so that he could have time to find other counsel of his choice and not have to represent himself Pro Se. Said motion was then and there overruled.

The trial commenced on August 23, 1983, without Petitioner's counsel being present. Respondent was present by its counsel. Petitioner was presented Pro Se and a jury was selected.

Petitioner took ill on August 23, 1983, and was admitted to Methodist hospital in the Houston, Texas Medical Center on or about that night. The trial court was informed at 8:35 a.m. the morning of August 24, 1983, that Petitioner had been admitted to the hospital. However, the trial proceeded on August 24, 1983, without Petitioner or his counsel being present. Petitioner filed his motion for continuance based on illness and hospitalization, being supported by the sworn-to affidavit of his doctor, on August 25, 1983. Said motion was overruled not withstanding the

fact that Respondent did not file a controverting affidavit as required by applicable Texas case law.

The trial proceeded until August 26, 1983 without Petitioner or Petitioner's counsel ever being present, at which time the Respondent rested. The jury reached its verdict on August 31, 1983. The trial court rendered a judgment of disbarment on September 9, 1983.

Petitioner filed his motion for new trial on October 6, 1983. Said motion was based on the grounds that: (a) the trial court erred innot granting Petitioner's Motion for Continuance because of illness and hospitalization and that Petitioner was not represented at trial; (b) the trial court erred in not granting Petitioner's Motion for

Continuance because Petitioner was not granted sufficient time to find counsel of his choice who could adequately prepare himself; (c) the judgment was overly harsh; and for other reasons stated therein. The trial court heard and overruled the motion on November 7, 1983. Petitioner took exception to the proceedings of the trial court and to the trial court's judgment by filing notice of appeal on December 5, 1983.

REASONS FOR GRANTING THE WRIT

(1) A trial court which is hearing a disbarment suit in a state court needs to apply the standards of due process as established by the United States Supreme

Court in In Re Ruffalo as compared to the states own guidelines under its rules of civil procedure. Ruffalo established the Quasi Criminal nature of a disbarment suit.

(2) The Sixth Amendment guarantees that a trial court must give the defendant in a Quasi-Criminal proceeding such as a suit for disbarment a reasonable period of time to obtain counsel of his choice.

(3) When the trial court learned of this Petitioner's inability to be in court due to his hospitalization, its duty to inquire about the Petitioner's condition was never fulfilled and Petitioner's rights were further violated by the trial court's conducting the hearing without Petitioner's presence thus denying him his right to confront his accusers as guaranteed by the Six Amendment.

Petitioner has been deprived of his due process rights guaranteed by the Fifth and Fourteenth Amendments of the U.S. Constitution and of his Sixth Amendment right to "assistance of counsel." Although the case law of the State of Texas states that the Rules of Civil Procedure apply in a disbarment proceeding, the United States Supreme Court definitely established the quasi-criminal nature of disbarment proceedings and the consequence for procedural due process in In Re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222 (1968). The Court in In Re Ruffalo, supra, at 550, held that disbarment proceedings of an attorney,

> . . . are adversary proceedings of a quasi-criminal nature . . . and the [defendant] is accordingly

entitled to procedural due process which includes fair notice of the charge.

In view of the fact that the Court has deemed a disbarment proceeding to be of a quasi-criminal nature, it is reasonable to conclude that a defendant therein is entitled to the Sixth Amendment's right to assistance of counsel. See U. S. CONST. Amend. VI. Under this amendment and the due process of law clause of the Fifth Amendment of the United States Constitution, "assistance of counsel" means effective assistance (emphasis added). Neufield v. U. S., 118 F.2d (D.C. Cir. 1973), cert. denied, 315 U. S. 798 (_____). Can the assistance of counsel that Appellant had and/or did not have in the case at bar be viewed as effective in light of our constitutional and case law standards?

Further, a law license has been held to be a valuable property right [the license to practice law is for most attorneys their livelihood, Erdman v. Stevens, supra,[1] therefore the taking of Appellant's law license via disbarment without Appellant being at trial or having assistance of counsel at trial is tantamount to the government taking property from an individual in violation of that individual's rights of due process granted by the Fifth and Fourteenth Amendments of the U.S. Constitution].

The First Circuit has held as early as 1973 that,

[1]Erdman v. Stevens, U.S. 458 F.2d 1205 (2nd Ct. 1972)

> in view of the gravity of the punishment which may be meted out . . . with all of the consequential damages which that entails, the test which must be employed as to the constitutionality of the disciplinary machinery to be used must be a very severe one.

In Re Bithoney, 486 F.2d 319 (1st Cir. 1973). Indeed, that court commented that there should not be any inconsistency between the goal of vigilantly enforcing the disciplinary rules and the goal of providing the "strictest possible due process standards" for the procedures used to carry out necessary bar discipline. In Re Bithoney, supra, at 324.

To summarize the question which this petition presents is whether Texas is correct in applying non-criminal standards to a disbarment case and further did it even pass the mere civil standards without abridging the Fifth, Sixth and Fourteenth Amendments to the Constitution. This Court has already heard these arguments in the cases of (1) In Re Ruffalo and (2) In Re Bithoney.

Further, the trial judge who heard this case paid little or no attention to Petitioner's right to the effective assistance of counsel in preparing his case. Furthermore, the trial court was not asked at trial to inquire about the Petitioner's ability as an attorney to represent himself, but merely asked to determine whether the Petitioner was too ill to attend court

and continue in any capacity as counsel and witness in the case. Courts normally take great pains to allow a key witness to testify yet the trial court did not even try to ascertain the Petitioner's condition as required by law in any case where property will be taken from the Petitioner.

Finally, it appears that the trial court paid little or no attention to the M.D. in the case who filed an affidavit with the court that the Petitioner was hospitalized and unable to attend trial. What justice can be served by denying any person his day in court for reasons he cannot control.

CONCLUSION

WHEREFORE, Petitioner prays that this court grant plenary review, reverse the Texas Court of Appeals for the 10th Judicial District and hold there must be a reversal of judgment or reversal of the trial court with remand to the trial court level in order to protect this Petitioner's rights under the Fifth, Six and Fourteenth Amendments of the Constitution.

Respectfully submitted

HOWARD M. RUBINSTEIN
Pro-Se for Petitioner
1301 Leeland
Houston, Texas 77002

Dated: April 6, 1986

MANDATE

THE STATE OF TEXAS

TO THE 61st JUDICIAL DISTRICT COURT OF HARRIS COUNTY, GREETING:

Before our Court of Appeals on the 17th day of January A.D. 1985, the cause upon appeal to revise or reverse your judgment between

HOWARD RUBINSTEIN, Appellant

Trial Court No. 81-69 and

Court of Appeals No. 10-84-016-CV

THE STATE OF TEXAS, Appellee was determined; and therein our said Court of Appeals made its order in these words:

"This cause came on to be heard on the trascript of the record, and the same being considered, because it is the opinion of this Court that there was no error in the judgment of the court below; it is therefore ordered, adjudged and decreed that the judgment entered on the 9th day of September, 1983 be, and hereby is, affirmed. It is further ordered that Appellant Howard Rubinstein, who has a cash deposit with the District Clerk of Harris County, Texas in lieu of an appeal bond, pay all costs in this behalf expended, and this decision can be certified below for observance."

WHEREFORE WE COMMAND YOU to observe the order of our said Court of Appeals in this behalf, and in all things to have it duly recognized, obeyed and executed.

WITNESS the Hon. FRANK G. McDONALD, Chief Justice of our said Court of Appeals of Texas, with the seal thereof annexed, at the City of Waco, this 29th day of January, A.D. 1986.

ROBERT G. WATTS, CLERK

BY: _____
Deputy

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

January 8, 1986

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RE: Case No. C-4040

STYLE: HOWARD RUBINSTEIN
v. THE STATE OF TEXAS

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion